United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1335

To be argued by
MICHAEL D. ABZUG

B
PMS

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 76-1335

UNITED STATES OF AMERICA,
Appellee,

—v.—

PETER VARIANO, HENRY BUCCI, ANTHONY RUSSILLO, MICHAEL DEMICHAELS, JOHN MONACO, and MICHAEL EVANGELISTA,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

MICHAEL D. ABZUG,
Special Attorney,
Department of Justice.
AUDREY STRAUSS,
Assistant United States Attorney,
Of Counsel.

TABLE OF CONTENTS

TABLE OF CASES

PAGE

STATUTES

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1335

UNITED STATES OF AMERICA,

Appellee,

—v.—

PETER VARIANO, HENRY BUCCI, ANTHONY RUSSILLO, MICHAEL DEMICHAELS, JOHN MONACO, and MICHAEL EVANGELISTA,

Defendants-Appellants.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Peter Variano, Henry Bucci, Anthony Russillo, Michael DeMichaels, and John Monaco appeal from judgments of convictions entered on July 8, 1976, in the United States District Court for the Southern District of New York after an eight-day trial before the Honorable Robert L. Carter, United States District Judge, and a jury. Michael Evangelista appeals from a judgment of conviction entered on June 8, 1976, in the United States District Court for the Southern District of New York, following his plea of guilty before Judge Carter.

Indictment S76 Cr. 377, filed April 14, 1976, in two counts, charged Lawrence Centore, Michael Yannicelli,

Peter Variano, William Murty, Michael Evangelista, Michael Picciano, Michael DeMichaels, James Ostrander, John M[illegible]o, Anthony Russillo, Henry Bucci, Frank Galella a[illegible] Alfonso Coletti in Count One with conspiring to conduct an illegal gambling business in violation of Title 18, United States Code, Sections 371. Count Two charged the same defendants with conducting an illegal gambling business in violation of Title 18, United States Code, Section 1955.*

On April 27, 1976, Michael Yannicelli pleaded guilty to Counts One and Two of Indictment S76 Cr. 377. William Murty, Frank Galell[illegible] and Michael Evangelista pleaded guilty to Count Two ** Trial commenced against the remaining defendants on the same day.

On May 5, 1976 the Government rested its case and the trial court granted the defendants' motion to dismiss Count One on the ground that there had been a material variance between the indictment and the proof adduced at trial.

---

* Indictment S76 Cr. 377 superceded Indictment 76 Cr. 141, which was filed on February 9, 1976. The superceding indictment was virtually identical to the initial indictment except that the superceder reduced the temporal scope of Count Two. Specifically, the initial indictment charged that the defendants began to conduct an illegal gambling business on or about September 1, 1968, whereas the superceding indictment charged that the crime began on or about April 15, 1971.

** Evangelista entered his guilty plea with the understanding that he preserved his right to appeal the denial of his pre-trial motions to suppress under the procedure approved by this Court. *United States* v. *Mullens*, 536 F.2d 997 (2d Cir. 1976); *United States* v. *Bronstein*, 521 F.2d 459, 460 (2d Cir. 1975); *United States* v. *Pond*, 523 F.2d 210, 212 (2d Cir. 1975); *United States* v. *Burke*, 517 F.2d 377, 379 (2d Cir. 1975).

On May 6, 1976, the jury returned guilty verdicts as Variano, Picciano, Monaco, DeMichaels, Bucci, and ussillo on Count Two, the remaining substantive charge; returned not guilty verdicts as to Coletti and Ostrander; nd it reported its inability to reach a verdict as to entore.

On June 8, 1976, Judge Carter sentenced Evangelista o one year imprisonment with execution of all but thirty ays suspended. On July 8, 1976, Judge Carter sen- enced Variano to three years imprisonment and a fine f $20,000; Russillo to two years imprisonment with xecution of all but five months suspended; DeMichaels o one year imprisonment with execution of all but four nonths suspended and a fine of $5,000; Monaco to one ear imprisonment with execution of all but thirty days spended; and Bucci to two years imprisonment with xecution of the entire term suspended.

The defendants are at liberty on bail pending this ppeal.

Statement of Facts

A. Pre-Trial Hearing

The day before trial began, an evidentiary hearing was held to resolve various pre-trial motions. These included the defendants' motions to suppress the results of electronic surveillance on the ground that the interception of communications was not minimized; Evangelista's motion to suppress the results of electronic surveillance on the ground that he was not served with a notice of interception within the statutorily prescribed time period; and Monaco's motion to suppress gambling records seized from him on September 3, 1974.

1. The Electronic Surveillance

The hearing established that on November 8, 1974, a judge of the Westchester County Court signed an order authorizing the interception of any wire communications pertaining to gambling conducted over the telephone line of Anthony Millow, 25 Cedar Street, North Tarrytown, New York. That order authorized interception for thirty days. A renewal order was signed on December 7, 1974 authorizing interception for an additional thirty days. However, interception was terminated on December 31, 1974. (Tr. 17-19).* Goodrich testified that during the period of interception he received the original tapes almost daily. Upon receipt they were locked in his office file cabinet. (Tr. 30). Goodrich stated that the brief delay between the termination of interception on December 31, 1974 and the sealing on January 14, 1975, was attributable to a variety of circumstances including duplication of the original tapes, the prospect of their immediate need in a grand jury proceeding, and the pressing necessity to review them to attempt to locate Anthony Russillo who, at that time, was a fugitive. (Tr. 32-33). Though Goodrich testified that the first notices were issued on November 14, 1974, (which would be during the period authorized for interception), Variano's Exhibit A shows that Goodrich was mistaken and that the notices were issued on January 14, 1975. The notice was issued to all persons whose conversations were known to have been intercepted on the wiretap. Evangelista's voice had not been identified and, accordingly, he was not among the

---

* References to the hearing and trial transcript are abbreviated as "Tr."; references of appellants' briefs are abbreviated as "Br."; references to appellants' appendices are abbreviated as "App."

sixteen people who received notices of interception. (Tr. 94).*

At the close of the evidence pertaining to the electronic surveillance, the trial court ruled that the interception was properly minimized and that Evangelista suffered no prejudice by the Government's failure to notify him of his interception within the statutorily prescribed period. (Tr. 141-42, 154-55, 158-59).

2. Seizures from Monaco

The Government called James Trotta, a patrolman in the Yonkers Police Department, to testify in connection with Monaco's motion to suppress gambling records seized from him on September 3, 1974. Trotta testified that while he was on patrol on September 3rd, he observed Monaco driving a 1972 Ford with a cracked windshield. (Tr. 211).** Trotta stopped Monaco to issue a violation and to investigate. (Tr. 212, 221, 250). Monaco was unable to produce a driver's license. (Tr. 213). Monaco was placed in the patrol car for transportation

---

* Circumstantial evidence available to the Government at the time of indictment suggested that Evangelista had been intercepted. However, enough doubt remained so that shortly before trial the Government served Evangelista with a subpoena duces tecum calling for a voice exemplar. (Tr. 12-13, 235-39). In any event, six weeks before trial the Government disclosed to Evangelista all orders, affidavits, applications, and technical logs pertaining to the electronic surveillance, made duplicate tape-recordings available for inspection, specified which conversations were going to be introduced against him at trial, and waived all issues of standing to afford Evangelista an adequate opportunity to prepare his defense for trial. (Tr. 142-44).

** Approximately two months before this incident, Trotta had arrested Monaco, who at that time produced a suspended or revoked driver's license. (Tr. 250).

to the stationhouse. To protect Monaco's vehicle from theft or vandalism, Trotta entered the Ford so that he could drive it to the stationhouse for impoundment. (Tr. 214). As Trotta accelerated, three white envelopes secreted behind the sun visor on the driver's side of the vehicle fell into his lap. (Tr. 214). Based on his three years experience on the gambling squad, Trotta recognized the envelopes as gambling records and confiscated them. (Tr. 214). At the stationhouse, Trotta found additional gambling records secreted in Monaco's waistband in the course of a pre-booking search. (Tr. 216-17). At the conclusion of Trotta's testimony, the court denied Monaco's motion to suppress the gambling records seized from him on September 3rd. (Tr. 251).

B. Government's Case

The evidence at trial revealed the existence of a multi-million dollar gambling operation in the Bronx and Westchester Counties during various time periods from 1968 through 1975. During 1968 through 1972 the operation was run by Michael Yannicelli. From 1973 to 1975 it was supervised by Peter Variano. The evidence showed the participation of Michael DeMichaels and William Murty during the earlier time period. During the later time a more detailed picture established that Francis Millow was the nerve center of the operation. In North Tarrytown, Anthony Russillo and Henry Bucci collected wagers and gave them to Millow who would, in turn, convey them by telephone to Michael Evangelista in the Bronx who would record them on coded slips of paper and give them to William Murty, John Monaco or Michael Picciano. In Hastings-on-Hudson, DeMichaels collected wagers and gave them to Millow or Monaco.

Michael Calise testified that during most of the period from December, 1968 to August, 1971 he worked

in Westchester County as a "runner" and as a "pick-up man" for Michael Yannicelli's gambling operation. (Tr. 372-88).* During his tenure as a pick-up man he worked six days a week in Yonkers, Hastings-on-Hudson, Eastchester and Tuckahoe with William Murty who was also a pick-up man for the operation. (Tr. 398-99, 414). Calise testified about the meaning of approximately twenty codes used by the various runners in the Yannicelli organization. (Tr. 399). "No. 19" represented horse and policy wagers collected in Hastings-on-Hudson by Michael DeMichaels.** (Tr. 404). While he was a pick-up man, Calise went to the Green Tavern in Hastings-on-Hudson to give DeMichaels or, in his absence, the bartender, DeMichaels' daily "tape."*** (Tr. 405-06).

After a brief period during which he worked as a truck driver, Calise returned to the operation and, from December of 1971 until July of 1972, worked in the "horse office" accepting horse wagers over the telephone.

---

* A "runner" is an individual who collects a bettor's "action" or wagers. (Tr. 382). A "pick-up man" is an individual who meets various runners every day to collect the wagers which they previously accepted from their bettors. (Tr. 385).

** Calise identified records seized in Yonkers from Yannicelli on October 9, 1970, as football, horse and policy wagers collected by or on behalf of "No. 19" who was Michael DeMichaels. (Tr. 446-48, 453A, 456, 458, 460, 461, 462). Wagers submitted by "No. 19's" runners ("Silver," "Gallo," and "Nick") were also found among the gambling records seized in Yonkers on September 3, 1974 from John Monaco. (Tr. 480-82). This similarity suggested that DeMichaels remained active in the illegal gambling operation from the early period of 1970 through 1974, particularly in light of Calise's further testimony that the codes were never changed or reassigned to another runner or "account." (Tr. 431, 499, 517).

*** The "tape" reflected the total amount of numbers wagers placed with DeMichaels on the previous day plus any winning bets or "hits." (Tr. 405).

(Tr. 417-18). Beginning in March of 1972, Calise also began to compute the daily and weekly results of all the horse wagers collected by the operation. (Tr. 427).* From the beginning of July, 1972 until August 27, 1972, Calise worked as a "pay-and-collect" ** man for Yannicelli. Calise paid or collected from DeMichaels at the Green Tavern every Thursday during this two month period. (Tr. 437). On August 27, 1972, Calise spoke to DeMichaels at the Green Tavern to ask him to pay him $1700 that "No. 19" owed the operation (Tr. 430). DeMichaels agreed and gave him $1700 in cash which Calise used to leave town with his family. (Tr. 437).***

Angelina David testified that in August of 1973, Variano told her that he was running a policy, sports, and horse gambling operation with Bucci and asked her to help with the bookkeeping. (Tr. 635, 647, 660, 663). David agreed and every Saturday night from the beginning of September, 1973 until the third week of December, 1973, Variano gave her the operation's football wagers in a brown paper bag. (Tr. 642-43). David "tallied" the wagers in her apartment the following mornings and gave the results to Variano Sunday evenings. (Tr. 638, 642-43).**** The operation had about

---

* The weekly horse tapes, together with the weekly numbers tapes computed by William Murty, were examined by Yannicelli every Sunday morning. (Tr. 427).

** A "pay-and-collect" man pays the operation's losses to its runners and collects the operation's winnings from its runners. (Tr. 432).

*** Calise needed to leave town because he had been using the operation's money to cover his gambling losses. (Tr. 437).

**** "Tallying" involved computing the gross amount wagered and subtracting the 25% to 30% commission which each runner or "account" received. (Tr. 639, 685). David also helped Variano and Bucci "knock-out" the work (that is, determine the winning wagers) one Sunday evening but refused to do it again because of the loud disputes which arose between Variano and Bucci. (Tr. 641).

twenty to thirty football accounts, one of whom was "Pop" Millow. (Tr. 642). On Saturday nights, David also heard Variano, Bucci, and Millow discuss policy wagers placed with their operation. (Tr. 648). David concluded her testimony on direct examination by stating that during the last six months of 1973, Variano drove her to various motels around Westchester where he would pay to or collect money from pick-up men in this operation. (Tr. 649).

Following David's testimony, the Government introduced records of an unlawful policy, football, and horse gambling business that were seized pursuant to Westchester County Court search warrants from Bucci's place of business, the Headless Horseman Sports Center, 66 Beekman Avenue, North Tarrytown, New York, on November 23, 1974; from Millow's residence, 25 Cedar Street, North Tarrytown, New York on December 31, 1974; and from Russillo's residence, 211 Third Avenue, Pelham, New York on December 31, 1974. (Tr. 621-28, 580-86, 621-28). The policy, horse, and football wagers seized from various spots at the Headless Horseman Sports Center were liberally sprinkled with Bucci's fingerprints. (Tr. 937). The records seized from Francis Millows' residence were also identified as policy and horse wagers. (Tr. 861-65). The notations on these records coincided with documents seized from Bucci. (Tr. 852, 858). The records seized from Russillo's residence were identified as football and basketball wagers reflecting annual gross wagering of over $1,200,000. (Tr. 869). These documents, which Russillo conceded to be covered with his fingerprints, coincided with the records seized from Millow. (Tr. 869-73, 937-38).*

---

* The documents seized from Russillo reflected financial records of "Pop" and "Russ." "Russ," of course, referred to Russillo. "Pop" was identified as one of Millow's nicknames. (Tr. 642). The notation "Pop" also appeared in the gambling material seized from William Murty on December 27, 1974. (Tr. 826-28).

In addition to the evidence obtained in the search and seizures, the Government introduced evidence gathered from electronic surveillance. This included two tape-recorded conversations between Variano and Millow. One tape revealed that on November 14, 1974, Variano called Millow to ask how the "football" business was going and to tell him that if he had any problems to "leave word at the office." (Tr. 1162). During another tape-recorded conversation on November 23, 1974, the day of the Headless Horseman Sports Center was searched and Bucci was arrested. Millow told Variano that "the bank went broke." Variano then asked Millow to meet him at the Green Tavern in Hastings-on-Hudson. (Tr. 621-28, 1149). The Government also introduced eight tape-recorded telephone conversations between Russillo and Millow during which they discussed pay-and-collects for sports and policy wagering as well of the arrest of "Pete's man," Bucci. (Tr. 1201-16).* Lastly, the Government introduced a number of telephone calls during which Millow transmitted policy wagers from his home in North Tarrytown to Evangelista in an apartment in the Bronx owned by Theresa Belardo. (Tr. 1178-81, 1191-93).

With respect to the last group of telephone conversations, Mrs. Belardo testified that she rented the use of the phones in her apartment at 929 East 213th Street to Evangelista for $60.00 a week during the Spring of 1974 and during December of 1974. (Tr. 718-19, 721). During these periods, Evangelist accepted short, frequent telephone calls between 10:00 a.m. and 1:30 p.m. and 6:00 p.m. and 8:00 p.m.; he recorded these messages on a pad of paper that he always brought with him. (Tr. 720). On December 31, 1974, Belardo's apartment was

---

* These calls were intercepted on November 18, 19, 20, 21, 23, and 28, 1974.

searched at 1:30 p.m. pursuant to a Westchester County Court warrant and a quantity of policy wagers recorded on water soluble paper was seized from Evangelista. (Tr. 810-16, 874-75).

Prior to the December 31st search of Belardo's apartment, surveillances in the general vicinity of her apartment revealed Evangelista meeting Murty or Picciano at approximately 1:45 p.m. on eight separate occasions between December 10 and 23, 1974.* On three of these occasions, Monaco was observed meeting with either Evangelista or Murty.** Finally, Government surveillances revealed Francis Millow stopping briefly at the Green Tavern in Hastings-on-Hudson on several occasions between March 1, 1974 and April 29, 1974.*** These stops

---

* The surveillances were on December 10th (Tr. 749-50, 775); 12th (Tr. 752-77); 13th (Tr. 754); 14th (Tr. 801); 16th (Tr. 756, 798); 18th (Tr. 757); 19th (Tr. 802); and 23rd (Tr. 803). The times of these meetings are significant since it is immediately after the close of the policy gambling business day. (Tr. 372-73). The significance was borne out by a search of Picciano and Murty at approximately 1:45 p.m. on December 27, 1974. The search of Picciano revealed $2,253 in policy bets. (Tr. 860). Many of these bets had the code ("NE") that Calise said belonged to wagers collected in New Rochelle. (Tr. 861). The search of Murty revealed a large quantity of policy wagers, some received on the account of "Pop," which reflected the exact policy wagers that Millow transmitted to Evangelista during their electronically monitored telephone conversation earlier that day at 12:30 p.m. (Tr. 827-28, 859-68, 1192).

** These surveillances were on December 13th (Tr. 754); 18th (Tr. 801), and 23rd where Monaco was also observed carrying a brown paper bag as well as dropping off Evangelista and circling a block until Evangelista had retrieved an object from some high weeds. (Tr. 803). Monaco's link to the operation was also established by the fact that DeMichaels' code—No. 19—was found among the gambling records seized from him in Yonkers on September 3, 1974.

*** These surveillances were on March 1st (Tr. 706); 19th (Tr. 702-04); and 27th (Tr. 704-05) and April 8th (Tr. 738); 9th (Tr. 745); 15th (Tr. 707); and 29th (Tr. 710).

all occurred at approximately 1:45 p.m. or shortly after the end of the policy gambling business day. On two occasions, he met Variano and Yannicelli. (Tr. 738-748).

C. The Defense Case

None of the defendants offered any evidence.

ARGUMENT

POINT I

Dismissal of the Conspiracy Count Did Not Require a Mistrial as to the Substantive Count.

Variano, Bucci, Russillo and DeMichaels each argue that the dismissal of the conspiracy count required that a new trial be granted as to the remaining substantive count. (Variano Br. 35-38; Bucci Br. 13-16; Russillo Br. 16-18; DeMichaels Br. 27-34). Although each of these defendants labels and casts the argument somewhat differently, the gist of each of their complaints is that there was a spill-over of evidence from the conspiracy count which prejudiced the jury's consideration of Count Two, charging an illegal gambling business. This argument is advanced by exaggerating the extent of the evidence admissible solely on the conspiracy count; by ignoring the District Court's instructions to the jury on this issue; and by disregarding the indications in the record that the jury in this case considered only the evidence on the substantive count as it was instructed to do.

At the outset, we must object to any suggestions that the dismissal of the conspiracy count demonstrates a bad faith effort by the Government to join the defendants in a conspiracy charge so that it could "inundate the jury

with the weight of governmental activities, state and federal, spiced with violence and corruption in a mass trial." (Bucci Br. 14). It was apparent at the trial that the Government's proof of the conspiracy charge was unexpectedly sabotaged by Millow's refusal to testify under a grant of immunity. (Tr. 312-14, 318, 569, 572, 577, 1263). In these circumstances, there is no basis for an assertion that the allegation of a conspiracy charge was an act of bad faith. *United States* v. *Bentvena*, 319 F.2d 916, 949-50 (2d Cir.), *cert. denied*, 375 U.S. 940 (1963).

Under the law of this circuit it is settled that "where several defendants are indicted jointly, all charged with conspiracy and one or more charged with various substantial offenses in the same general subject matter, and the conspiracy count is dismissed as against one or more of the defendants at the close of the prosecution's evidence, instructions to the jury with respect to the evidence to be considered by them against a particular defendant or defendants will be deemed a sufficient safeguard of the rights of such defendant or defendants in the absence of bad faith on the part of the government in bringing the conspiracy count or some special circumstance of an extraordinary and unusual character." *United States* v. *Manfredi*, 275 F.2d 588, 593 (2d Cir.), *cert. denied*, 363 U.S. 828 (1960); *United States* v. *Elgisser*, 334 F.2d 103, 107 (2d Cir.), *cert. denied*, 379 U.S. 879 (1964); see *United States* v. *James*, 378 F.2d 88, 91 (6th Cir. 1967); *United States* v. *Berling*, 324 F.2d 249, 252-53 (7th Cir. 1963).

Although the defendants are charged with the burden of showing the prejudice, their arguments are notably lacking in specific claims of evidence admissible only in the conspiracy count which allegedly "spilt-over" into the jury's consideration of the substantive count. This absence of specificity, together with the failure to move to

strike the allegedly prejudicial evidence or to move for a mistrial at the end of the Government's case, (Tr. 1237-72), casts doubt on their present claim of prejudice. *United States* v. *Burnley*, 452 F.2d 1133, 1134 (9th Cir. 1971); *United States* v. *Wilson*, 434 F.2d 494, 500 (D.C. Cir. 1970); *cf. United States* v. *Branker*, 395 F.2d 881, 887 (2d Cir.), *cert. denied*, 393 U.S. 1029 (1968) (vigorous objections to the jury's consideration of a substantive count where hearsay testimony was rendered inadmissible by the dismissal of a conspiracy count). Simply because "the prosecution has not proved its case on the conspiracy count, the defendants are not, solely because they have been forced to sit through a long trial, entitled to the bonus of acquittal or reversal on the substantive counts that the government has proved." *United States* v. *Bentvena*, *supra* at 950.

In this case, the hearsay testimony which was arguably rendered inadmissible by the dismissal of the conspiracy count constituted a very small portion of the evidence adduced at trial. It was limited to the first day of a two-week trial and consisted of Calise's testimony about fourteen conversations which he had with either Yannicelli, Murty, Centore or a runner named Danny Marciano about his role in Yannicelli's operation during 1968 to 1972.* Calise's testimony was dwarfed by the remainder of the Government's case consisting of the testimony of twenty-eight witnesses, fifteen tape-recorded telephone calls and over fifty exhibits (not including the records seized from Yannicelli), all of which were admissible to prove Count Two. The admissible proof consumed well-over 90% of the trial record. *Compare, United*

---

* Calise testified about six conversations he had with Centore (Tr. 378, 380, 381, 388-91, 415, 433-34); six conversations with Yannicelli (Tr. 397, 413-14, 418, 431, 432, 435); one conversation with Murty (Tr. 417); and one conversation with Danny Marciano (Tr. 421).

States v. *Branker*, *supra* at 888, ("weeks" of inadmissible testimony); *United States* v. *Kelly*, 349 F.2d 720, 759 (2d Cir. 1965), *cert. denied*, 384 U.S. 947 (1966), (three months of inadmissible testimony); *United States* v. *Bentvena*, *supra* at 955, ("months" of inadmissible testimony).

Among the conversations rendered inadmissible, none even mentioned the appellants much less discussed them in a prejudicial fashion. *Cf. United States* v. *Branker*, *supra* at 888; *United States* v. *Kelly*, *supra* at 758. Similarly, with the isolated exception of Centore's remark to Calise that "we pay cops," none of the testimony involved criminal activity of a type other than that with which the defendants were charged in Count Two. (Tr. 378, 380). *Cf. United States* v. *Ong*, Dkt. No. 76-1087, slip op. 5528, (2d Cir. Sept. 14. 1976); *United States* v. *Papadakis*, 510 F.2d 278, 300 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975); *United States* v. *Bentvena*, *supra* at 955.* Moreover, since the dismissal of the conspiracy count left only one remaining count for the jury to consider, they were not confronted with a complex record and instructions which would make it "difficult for a juror to keep the various charges against the several defendants and the testimony as to each of them separate in his mind." *Compare United States* v. *Ong*, *supra* (78 substantive counts remaining); *United States* v. *Branker*, *supra* (88 substantive counts remaining); *United States* v. *Kelly*, *supra* (7 substantive counts remaining); *United States* v. *Bentvena*, *supra* (7 substantive counts remaining) *with United*

* By the same token, the gambling records seized from Vannicelli in 1970 and introduced into evidence were not prejudicial to the defendants since they were "merely duplicative of other like evidence" seized from them in 1974 or, in the case of Variano and DeMichaels, connected to them by the testimony of David and Calise. *United States* v. *Bentvena*, *supra*, 957.

States v. *Adams*, 434 F.2d 756, 758 n.3 (2d Cir. 1970) (one substantive count remaining).

Notwithstanding Variano's facile claim that "it was an exercise in futility" to expect the jury to exclude hearsay from its deliberations (Variano Br. 28), there is ample evidence on the record to support the view of Judge Carter, who was "convinced that the jury did a first-rate job in sifting the evidence and refusing to use anything but non-hearsay evidence to make its determination." (Sentencing minutes 7/8/76 at 33). The trial court repeatedly admonished the jury not to consider hearsay evidence. (Tr. 307, 309, 634, 1202, 1463-64, 1480-81).* *United States* v. *Schaffer*, 362 U.S. 511, 516 (1959); *United States* v. *Corr*, Dkt. No. 76-1115, slip op. 5891, 5912 (2d Cir. Oct. 22, 1976); *United States* v. *Berger*, 433 F.2d 680, 685 (2d Cir.), *cert. denied*, 401 U.S. 962 (1970); *United States* v. *Eligger*, *supra* at 107; *United States* v. *Manfredi*, *supra* at 593; *cf. United States* v. *Branker*, *supra* at 888-89; *United States* v. *Kelly*, *supra* at 758; *United States* v. *Bentvena*, *supra* at 955. The salutary effect of these instructions was further reinforced by the defendants' repeated reminders to the jury not to consider hearsay testimony. (Tr. 1331, 1361-62, 1366). *United States* v. *Cozetti*, 441 F.2d 344, 349 (9th

---

* These instructions were more restrictive than necessary. Since the court found multiple conspiracies, rather than a failure to prove a conspiracy, hearsay testimony pertaining to conversations during the "second conspiracy" (1973-1975) should have been admissible. Even in the absence of a conspiracy charge, hearsay statements made in furtherance of a joint venture are admissible on agency principles. *United States* v. *Zane*, 495 F.2d 683, 692 (2d Cir. 1974); See *United States* v. *Ruggiero*, 472 F.2d 599, 607 (2d Cir. 1973). Though this theory was not argued before the trial court, it is likely that at a new trial more, not less, hearsay evidence would be admitted against the defendants. Cf. *United States* v. *Branker*, *supra* at 888.

Cir. 1971). In addition, the prosecutor carefully segregated the evidence in his summation and rebuttal as to each defendant to minimize the possibility that the jury might erroneously consider hearsay testimony. (Tr. 1308-29, 1429-39). *Cf. United States* v. *Brandom*, 431 F.2d 1391, 1391 (7th Cir. 1970). The jury's ability to follow these admonitions was affirmatively demonstrated in two instances. In the course of its deliberations the foreman of the jury told the court explicitly that the jury did not want to consider any hearsay testimony. (Tr. 1474-75).* Moreover, the jury verdicts—which included six convictions, two acquittals, and a failure to reach a unanimous verdict as to one defendant—were another positive indication of the jurors' scrupulous effort to follow the District Court's instructions. *United States* v. *Papadakis*, *supra* at 300; *United States* v. *Leonard*, 494 F.2d 955, 977 (D.C. Cir. 1974); *United States* v. *Brandon*, *supra*; *United States* v. *Berling*, *supra* at 253.

Lastly, even assuming that the jury considered the limited inadmissible hearsay introduced by Calise, the Government submits that the "untainted" evidence of the searches, electronic surveillance, physical surveillance, combined with the testimony of the other witnesses, was overwhelming against each defendant and, accordingly, no substantial rights were affected. *United States* v. *Ong*, *supra* at 5528-29. Accordingly, any consideration which the jury may have given the inadmissible hearsay was harmless error.

---

* Even in absence of such explicit evidence of the jury's intent to disregard hearsay, this Court has expressed its belief that "a jury would scrutinize evidence of substantive guilt with greater than ordinary care once apprised of the fact that the Government had failed to prove its conspiracy case against a particular defendant." *United States* v. *Bentvena*, *supra* at 955.

POINT II

There Was No Material Variance between the Indictment and the Evidence Adduced as to Count Two.

Variano argues that the District Court should have dismissed Count Two when it found a material variance in the proof of Count One because both charges required proof of concerted action. (Variano Br. 33). Putting aside for a moment the doubtful merit of this position, Variano is precluded from raising it to this Court, having failed entirely to present it at any stage of the trial proceedings. *United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965), *cert. denied*, 383 U.S. 907 (1966).

In any event, the dismissal of the conspiracy count on the grounds of a material variance did not mandate the dismissal of the substantive count on the same ground. Despite Variano's efforts to suggest that the two counts essentially charged the same offense, the Supreme Court has held to the contrary. *Iannelli* v. *United States*, 420 U.S. 770 (1975). However, most importantly, the two charges in the indictment did not allege identical time periods. Count One alleged a conspiracy commencing in September, 1968; Count Two alleged an illegal gambling operation commencing in April, 1971. This is a crucial difference since that District Court found the variance in Count One because proof of that count showed more than one conspiracy during the longer time period. No such variance was found as to the shorter time period alleged in Count Two.

Finally, this Court has repeatedly held that a material variance must substantially prejudice a defendant before error is found. *United States* v. *Sir Kue Chin*, 534 F.2d

1032, 1035 (2d Cir. 1976); *United States* v. *Bertolotti*, 529 F.2d 149, 155-56 (2d Cir. 1975). Variano's failure to even specify any such prejudice makes this argument frivolous.

POINT III

There Was Sufficient Evidence For the Jury to Conclude That Russillo and Monaco Participated in the Unlawful Gambling Operation.

A. The Evidence of Russillo's Guilt was More Than Sufficient.

Conceding that he conducted an unlawful sports wagering business for more than thirty days that grossed $2,000 in a single day, Russillo challenges the sufficiency of the evidence by claiming that the Government failed to link his unlawful activities with that of five or more persons. (Russillo Br. 7). This argument is unsupported by the record which must, for these purposes, be viewed in the light most favorable to the Government. *Glasser* v. *United States*, 315 U.S. 60, 80 (1942).

In *United States* v. *Becker*, 461 F.2d 230, 232 (2d Cir. 1972), *vacated on other grounds*, 417 U.S. 903 (1974), this Court described the purpose of the criminal statute charged in this case, 18 U.S.C. § 1955, as follows:

> "The Congress' intent was to include all those who participate in the operation of a gambling business, regardless how minor their roles and whether or not they be labelled agents, runners, independent contractors or the like, and to exclude only customers of the business."

In evaluating sufficiency of evidence and in determining whether a defendant was proven to be a member of a

gambling operation involving five or more persons, courts have consistently looked for the interdependence of component parts of the operation. The practice of "laying-off" bets, that is, pooling bets to spread the risk, is consistently held to make the person engaging in that practice a member of the larger gambling operation with which he places the bets. *United States* v. *Shaeffer*, 510 F.2d 1307 (8th Cir.), *cert. denied*, 421 U.S. 978 (1975); *United States* v. *Thomas*, 508 F.2d 1200 (8th Cir.), *cert. denied*, 421 U.S. 947 (1975); *United States* v. *Bohm*, 508 F.2d 1145 (8th Cir.), *cert. denied*, 421 U.S. 947 (1975); *United States* v. *Guzek*, 527 F.2d 552 (8th Cir. 1975); *United States* v. *McHale*, 495 F.2d 15, 18 (7th Cir. 1974); *United States* v. *Brick*, 502 F.2d 219 (8th Cir. 1974); *United States* v. *Ceraso*, 467 F.2d 653, 656 (3rd Cir. 1972).

The evidence in this case showed Russillo to be a runner collecting sports and policy bets which were "laid off" by Millow with Variano's gambling operation. Variano was shown to be operating a long-term, substantial gambling business which included a wireroom in the Bronx—Theresa Belardo's apartment—where Evangelista regularly received wagers, including those phoned in by Millow. Russillo conveyed policy and sports wagers to Millow for himself and for other runners, as was evidenced by their conversation of November 18, 1974:

> Millow: Yeah, how much you gotta give me?
>
> Russillo: How much do I owe you? I don't know?
>
> Millow: You know.
>
> Russillo: You tell me.
>
> Millow: You must have counted on that machine all night long.
>
> Russillo: Yeah, I'm sorry I have not been worrying about that I have been worrying about other things here. How much is it?

Millow: 1510 right?

Russillo: For now.

Millow: Yeah, all together. This with your numbers in there that's my 170 off that I owe you. Sure.

Russillo: What you mean—hold on 1510?

Millow: Yeah.

Russillo: Hold on a minute. What is this with 15? What does this include? Explain to me everything. How much did Al lose?

Millow: 1810.

Russillo: Al loses 1810.

Millow: Yeah. Then you take what he won off of that.

Russillo: What do you mean, what he won?

Millow: What ever that horse paid, 240 off of that.

Russillo: Yeah.

Millow: And your 110.

Russillo: What 110.

Millow: For numbers.

Russillo: 110 for numbers?

Millow: Yeah.

Russillo: Just give me Al's figures, forget about my numbers for a minute. Just Al's figure what I gotta give you for Al. (Tr. 1204; GX 48A).

* * * * *

Russillo was fully aware that the bets were placed with Variano's operation, as demonstrated by the following conversations on November 21 and 26, 1974, about money owed to "Pete Peepers" (Variano):

Millow: Rusty nail, Pete Peepers is looking for 1100. Eddy's looking for 500. Everybody's looking for money here I can't collect no money from nobody.

Russillo: I know it.

Millow: Nobody wants to pay.

Russillo: You gotta get the customers paid at least (inaudible) . . .

Millow: That's one thing you get to do is pay the customers. (Tr. 1215-16; GX 49A).

* * * * *

Millow: So . . . 1200 owed to Pete tomorrow, Coletti don't want to wait another day.

Russillo: Joe as soon as I get it I'll give it to you what can I tell ya.

Millow: I can't push them off.

Russillo: Huh?

Millow: I can't push him off another day.

Russillo: You are gonna have to push him off until tomorrow.

Millow: Aw man.

Russillo: I'll try and get it.

Millow: You ain't gonna have no sports business here or nothing. I give you the cream of the business here.

* * * * *

Millow: What am I gonna do with Pete tomorrow?

Russillo: I'll have it tomorrow. You can give it to him.

Millow: He comes 9 o'clock in the morning here.

Russillo: You have to tell him to wait until the afternoon until the guy gives you the money.

* * * * *

(Tr. 1215; GX 47A).

Finally, electronic surveillance confirmed Russillo's familiarity Variano's responsibility for the operation. On November 23, 1974, a few hours after Bucci had been arrested for possession of sports and numbers wagers at the Headless Horseman Sports Center, the following conversation was intercepted:

* * * * *

Russillo: Hello.

Millow: Russell?

Russillo: Yeah.

Millow: Your friend is still up there incarcerated.

Russillo: Why can't get him out?

Millow: I don't know maybe he's on his own.

Russillo: . . . (Inaudible)—Pete's man, Pete's supposed to get him out.

Millow: Huh? Yeah.

Russillo: Huh?

Millow: Well, Pete didn't seem to be too worried about it, now that I think of it, down there, they just come for the prisoner meal. (Tr. 1215; GX 55D).

On this evidence a jury was clearly entitled to infer that Russillo was a member of this sports and policy gambling operation which had far more than five members.

B. The Evidence of Monaco's Guilt Was More Than Sufficient

The evidence of Monaco's participation as a pick-up man in Variano's numbers business was equally sufficient. Special Agents of the Federal Bureau of Investigation observed Monaco meeting either Evangelista, Murty, or Picciano in the immediate vicinity of Variano's wireroom in the Bronx at approximately 1:45 p.m. on December 13, 18, and 23, 1974. (Tr. 754, 801, 803). The timing of those meetings is particularly significant since policy wagers are not accepted after 1:30 p.m. to protect the computation of the winning "number." (Tr. 372-73). The jury was entitled to infer that Monaco's regular appearance around the wireroom at that hour resulted from his job as a pick-up man.

His presence there with Evangelista, Murty and Picciano was made even more significant by the evidence that each of those three persons was later searched and found to be in possession of numbers wagers collected by various runners. On December 27, 1974, Picciano was carrying $2,253 in numbers wagers (Tr. 860-61) and Murty was carrying the wagers collected by about fifteen runners including one code-named "Pop", Millow's nickname.* (Tr. 827-28, 859-68, 1178). On December 31, 1974 when the Bronx wireroom was searched, Evangelista was discovered attempting to destroy a large amount of numbers wagers which had been recorded on water soluable paper. (Tr. 811-16, 874-75).

Finally, on September 3, 1974, Monaco himself was searched in Yonkers and found in possession of records

---

* "Pop's" slip bore the exact numbers wagers conveyed earlier in the day by telephone from Millow to Evangelista. (Tr. 1192; GX 58).

which established his role as a pick-up man. Specifically, that search revealed a large amount of numbers wagers collected by various runners including "No. 19"—the imprimature of another member of the numbers operation, DeMichaels. (Tr. 357-58, 404-06, 480-81). On this evidence, a jury could fairly find Monaco's substantial participation in the gambling operation proved in this case.

POINT IV

No Prejudice Resulted from Millow's Invocation of the Fifth Amendment and His Citation For Contempt in the Presence of the Jury.

Variano, Bucci and Russillo each argue that they were prejudiced when Francis J. Millow, an unindicted co-conspirator under subpoena by the Government, refused, in the presence of the jury, to testify. (Variano Br. 33-35; Bucci Br. 17-18; Russillo Br. 13-15). They all claim that the incident gave the jury the impression that the defendants intimidated Millow and thereby procured his silence. This resulted in prejudice which, they say, requires a new trial.

Before turning to the law applicable to this claim, it is necessary to first review the pertinent portions of the record. On April 29, 1976 the Government called Francis Millow, who, as reflected in the Government's opening, was expected to provide substantial evidence in this case. (Tr. 313-14, 317-18). After Millow was sworn before the jury, the Government began his direct examination which proceeded without problem through five questions about his personal background. (Tr. 565; App. 53a). However, when he was asked to state whether he knew the defendant Bucci, Millow asserted his Fifth Amendment privilege.

(Tr. 565; App. 53a). The Government then attempted to deal with that response by confronting Millow with an order which granted him immunity and by requesting the Court to direct that he answer the question. (Tr. 566-67; App. 53b-53c). Before deciding what to do, the District Court excused the jury. (Tr. 567; App. 53c).

Outside the presence of the jury, the Court attempted to explain to Millow his obligation to testify under the grant of immunity. Millow objected that he also needed immunity from the state. Judge Carter advised him that he did not and directed that he testify or be held in contempt. The Court then stated:

> I will give you a few minutes to make up your mind, and we will call the jury back and Mr. Absug [sic] will repeat the questions and you are to give answers to them. (Tr. 569; App. A-53e).

The jury was then called back. The prosecutor again asked the witness if he knew Bucci. Having apparently been convinced by Judge Carter that the Fifth Amendment privilege was unavailable to him, Millow answered as follows:

> Your Honor, I believe that I have to have a counsel here. I have to have my attorney here. I can't answer. I am afraid I might prejure myself once again. (Tr. 569-70; App. A-53e-53f).

The court again directed the witness to answer and when Millow once more asserted his need for advice of counsel, the court responded by saying, "All right. You are at this point in contempt, and we will proceed without you." (Tr. 570; App. A-53f). When asked by the court if the witness should be excused, the prosecutor responded that a marshal should be called. The jury was then excused,

(Tr. 570; App. A-53f), evidently before the marshal arrived. (Tr. 571; App. A-53).*

Of the three defendants who assign error to this incident, only one, Bucci, raised the issue at trial. Bucci moved for a mistrial shortly after Millow first refused to answer. (Tr. 566; App. A-53b). However, none of the defendants objected when Millow was recalled before the jury, nor was that second incident the subject of any motion for a mistrial. Thus, except for Bucci's preservation of the issue during the first incident of Millow's refusal to testify, the issue has been waived. *United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965), *cert. denied*, 383 U.S. 907 (1966).

However, to the extent that the issue was preserved by Bucci and even if fully preserved by each of the defendants who raise the point to this Court, there was no prejudicial error requiring reversal. This Court held in *United States* v. *Maloney*, 262 F.2d 535 (2d Cir. 1959) that the prosecution may not call a witness whom it knows will invoke the Fifth Amendment and then bolster its case by posing questions which, though unanswered by the witness, create inferences in the Government's favor. The rule was later explained by Judge Friendly as being based on the theory that it was prosecutorial misconduct to seek to build a case on inferences derived from invocation of the privilege, or alternatively, on the view that a defendant is unfairly prejudiced by his inability to cross-examine a witness presented in this way. *United States* v. *Burket*, 480 F.2d 568, 571-72 (2d Cir. 1973).

---

* On the following day, Millow was recalled outside the presence of the jury. An attorney, Mark A. Varricchio, appeared in his behalf and sought to assert Millow's right to refuse to testify on the ground that the prosecutor failed to keep certain promises made to him. The Court rejected the argument, held Millow in contempt and sentenced him to six months imprisonment. (Tr. 686-94).

It is apparent that this rule has no applicability when the prosecution is surprised by a witness' invocation of the Fifth Amendment or where the questioning of the witness is terminated upon his assertion of the privilege. See *United States* v. *Burket*, *supra*; *United States* v. *Roselli*, 432 F.2d 879 (9th Cir. 1970); *United States* v. *Rizzo*, 418 F.2d 71, 82 (7th Cir. 1969). Although Variano now argues that the Government should have known that Millow would invoke the Fifth Amendment, at trial no one challenged the Government's representation that it was utterly surprised and that Millow had indicated his willingness to testify only minutes before taking the stand. (Tr. 569; App. A-53e).

Furthermore, the questioning did not proceed beyond the single question as to whether Millow knew Bucci. Even if the jury was left to infer from Millow's refusal to answer that he did in fact know Bucci, the inference was surely not of substantial prejudice to Bucci. Cf. *Fletcher* v. *United States*, 332 F.2d 724 (D.C. Cir. 1964) (unanswered questions depicted the crime and reversal therefore warranted). Indeed, in view of Millow's later protest that he did not want to answer the question because he did not want to commit perjury again, the jury may well have concluded that Millow had previously testified that he knew Bucci and that when he had done so, he had testified falsely.

The claim that Millow's invocation of the Fifth Amendment gave rise to an inference that he was "reached" by the defendants amounts to no more than speculation. Although this Court has stated that a trial court need not ascertain a witness' willing to testify before the jury, *United States* v. *Sanchez*, 459 F.2d 100 (2d Cir.), *cert. denied*, 409 U.S. 864 (1972), and has suggested that the better practice is to make the determination outside the

presence of the jury, *United States* v. *Torres*, 503 F.2d 1120, 1125 (2d Cir. 1974), there is no authority requiring reversal merely because a witness has invoked the Fifth Amendment before the jury. Had the defendants believed the invocation of the Fifth Amendment by Millow was as prejudicial as they now claim, they could have sought an instruction that the jury disregard the incident or such further curative instructions as would have been appropriate. No such requests were made at trial and accordingly, the defendants should not now be heard to claim that there was an uncured error requiring a new trial. *United States* v. *Armedo-Sarmiento*, Dkt. No. 76-1113, slip op. 319 (2d Cir. Oct. 26, 1976).

Bucci and Russillo also argue that Judge Carter acted improperly by recalling Millow before the jury and stating at that time that he was in contempt.* Millow did not mention his Fifth Amendment privilege during this second incident, claiming instead that he did not want to testify for fear of committing perjury and that he wanted advice of counsel. The record as a whole indicates that Judge Carter recalled Millow in the hope that having had the immunity explained to him, he would now testify before the jury. Bucci's and Russillo's present objections to this procedure were not voiced to Judge Carter, who proceeded in this fashion without a single objection by trial counsel. (Tr. 569; App. A-53a). Absent objection to the procedure, the incident would give rise to a reversal only if it amounted to plain error. *United States* v. *Silverman*, 430 F.2d 106, 125 (2d Cir. 1970). Like the claims made in connection with Millow's invocation of the Fifth

---

* Bucci further states that Millow was arrested in front of the jury, however, the record does not support the assertion. It is apparent that after the jury was excused, the court was still awaiting the arrival of the marshal. (Tr. 571; App. A-53g).

Amendment, the prejudice asserted is merely speculative and hardly sufficient to demonstrate plain error.

POINT V

The Seizure of Gambling Records from Monaco's Automobile Was Entirely Lawful.

Monaco argues that this trial court erred when it denied his motion to suppress the gambling records seized from his automobile and person on September 3, 1974. At the suppression hearing Officer Trotta of the Yonkers Police Department testified that on September 3, 1974 he had observed Monaco driving with a cracked windshield and that from a prior incident he also knew that Monaco did not have a valid driver's license. (Tr. 212, 250). For both these reasons, he pulled Monaco over, confirmed that he had no license, and thereupon informed him that he would be issued a summons and that his car would be impounded. (Tr. 213-14). Officer Trotta then entered Monaco's car to drive it to police headquarters for impoundment. (Tr. 214). After he pulled away from the curb, gambling records fell from the sun visor. (Tr. 214). At the police station, a search of Monaco's person turned up more gambling records secreted in his waist band. (Tr. 216).

Monaco concedes that the "routine traffic stop [was] perfectly permissible and reasonable under the circumstances. . . ." (Monaco Br. 13). He only disputes the legal right of Officer Trotta to enter the vehicle, contending that the "intrusion cannot be justified solely on the whim or chance of a simple traffic violation." (Monaco Br. 11).

The applicable law does not support Monaco's position. Under New York law, Officer Trotta was fully authorized to arrest Monaco for driving with a cracked wind-

shield * and without a license.** A New York police officer is entitled to arrest a person without a warrant for any offense committed in his presence, § 140.10(1)(a), N.Y. Crim. Proc. L., and for purposes of arrest without a warrant pursuant to § 140, a traffic violation is specifically deemed to be an offense, § 155, N.Y. Vehicle and Traffic Law. Thus, after the stop, when the police officer confirmed that Monaco was driving a vehicle without a license and with a cracked windshield, probable cause existed for his arrest on either of these grounds.

Although Officer Trotta testified that Monaco was not officially placed under arrest at that time, it is apparent from the undisputed record that Monaco's freedom of movement was restrained when he was placed on the patrol car for the ride to the station house and that an arrest had in fact been effected. *Henry* v. *United States*, 361 U.S. 98, 103 (1959); *United States* v. *Washington*, 249 F. Supp. 40, 41 (D.D.C. 1965).***

Once Monaco was under arrest for the traffic violations, Officer Trotta was authorized to remove the vehi-

---

* Section 375(22), N.Y. Vehicle and Traffic Law, provides that it is unlawful to operate a vehicle equipped with broken or fractured glass.

** Section 509(2), N.Y. Vehicle and Traffic Law, provides that it is unlawful to operate a vehicle without valid driver's license.

*** Indeed, even if Monaco had not been actually placed under arrest at that time, it has been held that a search incident to arrest is justified by the probable cause to arrest, even where the arrest is not made before the search is undertaken. *United States* v. *Jenkins*, 496 F.2d 57, 72 (1974), *cert. denied*, 420 U.S. 925 (1975); *United States* v. *Riggs*, 474 F.2d 699, 704 (2d Cir.), *cert denied*, 414 U.S. 820 (1973); *United States* v. *Gorman*, 355 F.2d 151, 159-60 (2d Cir. 1965), *cert. denied*, 384 U.S. 1024 (1966). A search of a vehicle stopped for a traffic violation prior to a formal arrest was specifically upheld in *Welch* v. *United States*, 361 F.2d 214 (10th Cir.), *cert. denied*, 385 U.S. 876 (1966).

cle.* Thus, his entry into the car for this purpose was justified by "state law and sound police procedure." *Cady* v. *Dombrowski*, 413 U.S. 433, 447 (1973). Indisputably, incriminating evidence coming into his plain view during a lawful intrusion could be seized, *United States ex rel. La Belle* v. *La Vallee*, 517 F.2d 750, 755 (2d Cir. 1975), and, indeed, once the vehicle was properly taken into police custody, a warrantless search could have been conducted. *Cady* v. *Dombrowski*, *supra* at 441-42; *Harris* v. *United States*, 390 U.S. 234 (1968); *United States* v. *Zaicek*, 519 F.2d 412, 414-15 (2d Cir. 1975).**

POINT VI

The Supreme Court Justice Did Not Abuse His Discretion in Issuing Post-termination Notices Which Did Not Include Evangelista Whose Voice Had Not Been Identified on the Tapes.

Evangelista's only claim on appeal is that Judge Carter incorrectly refused to suppress evidence derived from a wiretap of which he did not receive post-termination notice to Section 700.50(3), N.Y. Crim. Proc. L.*** This

---

* Section 140.20(1)(i), N.Y. Crim. Proc. L., provides that following an arrest for a traffic infraction the officer must bring the prisoner to the nearest criminal court without unnecessary delay; Section 11-1002(3), N.Y. Uniform Vehicle Code, provides that an officer is authorized to remove a vehicle where the driver is arrested for an offense for which the officer is required to take the person before a Magistrate without delay.

** Monaco does not appear to dispute the legality of the seizure of other gambling records found on his person upon the pat-down at the station house. *Gilday* v. *Scafati*, 428 F.2d 1027, 1032 (1st Cir.), *cert. denied*, 400 U.S. 926 (1970).

*** That statute provides as follows:

> Within a reasonable time, but in no case later than

[Footnote continued on following page]

claim is frivolous. The statute was not violated and, in any event, Evangelista can show no prejudice from failure to receive the notice.

Although Evangelista attempts to paint a picture of blatant disregard for the provisions of the statute, the evidence at the suppression hearing established that state authorities scrupulously observed the statute's mandate. Fourteen days after the termination of the renewal order for the wiretap, the state prosecutor brought the matter before Westchester County Court Judge Richard Daronco who directed the issuance of notice to sixteen persons including all persons whose conversations we known to have been intercepted on the wiretap. (Tr. 45-48). Evangelista was not given notice because his voice had not been identified. (Tr. 93-94).

Evangelista's name was not included in the wiretap application nor was it included in the wiretap order. A person in that position is only entitled to notice "as the Justice may determine in his discretion is in the interest of justice." §700.50(3) N.Y. Crim. Proc. L. A violation of this provision may only be demonstrated by a showing that there was an abuse of discretion in the determination not to issue the notice. *United States* v. *Schwartz*, 535

---

ninety days after termination of an eavesdropping warrant, or expiration of an extension order, except as otherwise provided in subdivision four, written notice of the fact and date of the issuance of the eavesdropping warrant, and of the period of authorized eavesdropping warrant, and of the fact that during such period communications were or were not intercepted, must be personally served upon the person named in the warrant and such other parties to his discretion is in the interest of justice. The justice, upon the filing of a motion by any person served with such notice, may in inspection such portions of the intercepted communications, applications and warrants as the justice determines to be in the interest of justice.

F.2d 160, 164 (2d Cir. 1976) (under substantially identical federal provision, 18 U.S.C. § 2518(8)(d)); *United States* v. *Principie*, 531 F.2d 1132, 1143 (2d Cir. 1976). Here it can hardly be argued that County Court Judge abused his discretion in not issuing a notice Evangelista, who, according to the undisputed record, had not even been identified as a person whose conversations were intercepted.

Moreover, even a defendant entitled to mandatory notice under the statute must establish that he was prejudiced in order to win a motion to suppress grounded on a failure to issue the post-termination notice. *United States* v. *Principie*, *supra* at 1141-42; *United States* v. *Rizzo*, 492 F.2d 443, 447 (2d Cir.), *cert. denied*, 417 U.S. 944 (1974); *United States* v. *Manfredi;* 488 F.2d 588, 601-02 (2d Cir. 1973), *cert. denied*, 417 U.S. 936 (1974). See also *United States* v. *Gigante*, Dkt. No. 76-1128, slip. op. 4327, 4337 n.9 (2d Cir. June 22, 1976). Evangelista does not claim that he was prejudiced in any way, nor could he. Six weeks before trial, the Government disclosed to Evangelista all orders, affidavits, applications, and technical logs pertaining to the electronic surveillance. Duplicate tape-recordings were made available for his inspection. The Government also specified which conversations were going to be introduced against Evangelista at trial and waived all issues of standing to afford Evangelista an adequate opportunity to prepare his defense for trial. (Tr. 142-44). Thus, Evangelista suffered no prejudice and even if he had been entitled to notice—which we submit he was not—the motion to suppress would have been properly denied.

POINT VII

The Electronic Surveillance Was Conducted in Full Compliance with Statutory Requirements of New York Law.

Variano argues, almost in passing, that the tapes should have been suppressed because the minimization and sealing requirements of New York law were not met. (Variano Br. 40-41). With respect to minimization, Section 700.30(7), N.Y. Crim. Proc. L.,* Variano lacks standing to raise the issue since he was not a resident of the house in which the tapped phone was located. *United States* v. *Hinton*, Dkt. No. 75-1402, slip op. 5679, 5696 n.13 (2d Cir. Sept. 27, 1976); *United States* v. *Poeta*, 455 F.2d 117, 122 (2d Cir.), *cert. denied*, 406 U.S. 948 (1972). In any event, the evidence adduced at the suppression hearing proved full compliance with the minimization requirements. (Tr. 16-142). Variano was unable then, as he is unable now, to point to anything which contradicts the District Court's finding that the minimization requirements were met.

As to Variano's claim that there was a delay in sealing in violation of Section 700.40(2), N.Y. Crim. Proc. L.,** we must note that this contention was raised in only

---

* Section 700.30(7) provides: "A provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to eavesdropping under this article, and must terminate upon attainment of the authorized objective, or in any event in thirty days; . . ."

** Section 700.40(2) provides: "Immediately upon the expiration of the period of an eavesdropping warrant, the recordings of communications made pursuant to subdivision three of section 700.35 must be made available to the issuing justice and sealed under his directions."

the most cursory fashion in the Variano's pre-trial motions and was not even brought to the court's attention during the pre-trial hearing. (Tr. 137-38; Variano's Memorandum of Law filed April 3, 1976). Accordingly, the trial court dismissed the motion with the summary treatment that it deserved.

However, even if properly raised, the point was shown to be meritless. The Government produced ample evidence to support a finding that the tapes were sealed "without unnecessary or unreasonable delay." *People* v. *Guenther*, 81 Misc. 2d 258, 259, 366 N.Y.S. 2d 306, 308-09 (1975); *People* v. *Carter*, 81 Misc. 2d 345, 348-49, 365 N.Y.S. 2d 964, 968 (1975); *People* v. *Blanda*, 80 Misc. 2d 79, 81-82, 362 N.Y.S. 2d 735, 741 (1974); *United States* v. *Poeta*, 455 F.2d 117, 122 (2d Cir.), *cert. denied*, 406 U.S. 948 (1972); compare, *United States* v. *Gigante*, *supra*, at 4336-37. Assistant District Attorney Goodrich accounted for the seven-day delay in sealing the tapes.* As he testified, all of the tapes had not been duplicated by the expiration of the order. Additionally, there was pressing need to examine the tapes to locate Russillo who was a fugitive at the time, as well as the possibility of their immediate need as evidence before a grand jury. (Tr. 32-33). The short delay in sealing was more than justified, as the District Court found.

In cases involving equivalent and even longer delays, suppression has been denied where the delay was adequately justified. See, *e.g.*, *People* v. *Carter*, *supra* at

---

* While authorization for interception pursuant to the extension order was until January 7, 1975, interception was voluntarily terminated on December 31, 1974, when, in the judgment of Goodrich, the aim of the order had been attained. (Tr. 19). The tapes were sealed on January 14, 1976. (Tr. 31).

348-49 (7-day delay); *People* v. *Blanda*, *supra* at 81-82 (4-day delay); *United States* v. *Poeta*, *supra* at 122 (13-day delay); *United States* v. *Sklaroff*, 506 F.2d 837 (5th Cir. 1975) (14-day delay); *United States* v. *Falcone*, 505 F.2d 478 (3rd Cir. 1974), *cert. denied*, 420 U.S. 955 (1975) (45-day delay). But see *People* v. *Simmons*, 84 Misc. 2d 749, 752, 378 N.Y.S. 2d 263, 266 (1975) (21 to 190 day delay); *People* v. *Guenther*, *supra*, at 259 (7-day delay); *United States* v. *Gigante*, *supra* at 4331 (8-day to 12-month delay).

POINT VIII

Testimony That An Order Had Been Signed Which Authorized the Unsealing of the Tapes in Connection With "A Local State Matter Involving Mr. Russillo" Did Not Deprive Russillo of a Fair Trial.

Assistant District Attorney Goodrich was called as a witness to prove the authenticity of the tape recordings which the Government sought to introduce into evidence. In response to a question posed by the court, Goodrich stated that between January 14, 1975 and August of 1975, an order was signed by a Westchester County Court Judge which authorized the unsealing of the tapes in connection with "a local State matter involving Mr. Russillo." (Tr. 1087).* Russillo's attorney objected, however, he did not

---

* The full exchange is set forth below:

THE COURT: And am I to understand that that tape after it was sealed was kept there until some time in August, it was not moved until August when it was signed out pursuant to court order?

THE WITNESS: To the best of my knowledge, your Honor, that was up there until that time.

THE COURT: Then it was returned in August and it was not signed out again until you signed it out, or some-

[Footnote continued on following page]

move to strike that portion of Goodrich's testimony, request a curative instruction, or move for a mistrial. He now argues on appeal that the statement gravely prejudiced Russillo's right to a fair trial. This claim exaggerates the potential impact of the remark and overlooks defense counsel's own failure to seek curative measures from the District Court.

At worst, Goodrich's comment could have suggested to the jury that there was a state criminal matter pending against Russillo involving the same tapes. Far from raising the spectre of additional criminal activity by Russillo, this would have done no more than suggest that state law enforcement officials were duplicating the federal efforts to convict Russillo for the same gambling activities.

The comment was surely less prejudicial than testimony that a defendant had been in jail, which has been held not to create reversible error where the testimony

---

one under your direction had it signed out for delivery here?

THE WITNESS: Not in that interim, your Honor, it was signed out one other time pursuant to an order of compliance by Judge, I believe Judge Cousins, a County Court Judge, pursuant to a local State matter involving Mr. Russillo. His attorney had moved—

MR. SIEDLER: Objection, your Honor, objection, your Honor.

THE COURT: Well, Mr. Goodrich, you know we don't need to details. I think you ought to be sensitive enough to realize that. What you need to tell me is that it was signed out again pursuant to an order.

THE WITNESS: Yes, sir, it was. There was one other time there was and order, but it was never unsealed, yes.

THE COURT: It was never unsealed?

THE WITNESS: It was in my presence and it was not unsealed. There was an order to unseal it, but it was never unsealed. (Tr. 1086-87).

was followed by a curative instruction. *United States* v. *Bynum*, 485 F.2d 490, 503 (2d Cir. 1973), *vacated on other grounds*, 417 U.S. 903 (1974); *United States* v. *Stromberg*, 268 F.2d 256, 269 (2d Cir.), *cert. denied*, 361 U.S. 863 (1959). See also *United States* v. *Bell*, 500 F.2d 1287 (2d Cir. 1974). As in *United States* v. *Stromberg*, *supra*, the comment here was unforeseeable and "plainly it had not been induced by the prosecution." 268 F.2d at 269.

The cases cited by Russillo as support for his position are so entirely irrelevant that they do not merit discussion. *Hermansky* v. *United States*, 7 F.2d 458 (8th Cir. 1925) (introduction of evidence of reputation of place as bootlegging operation held error but not sufficient in itself to require reversal); *Mattson* v. *United States*, 7 F.2d 427 (8th Cir. 1925) (extensive hearsay evidence that defendant's home used to sell liquor held to create reversible error); *United States* v. *Campanaro*, 63 F. Supp. 811 (E.D. Pa. 1945); (motion for new trial granted where prosecution relied heavily on hearsay to prove its case).

Although Russillo complains to this Court that the testimony was not stricken and a curative instruction was not delivered, defense counsel failed to inform the District Court that he wanted those measures taken. He did not seek a sidebar conference for the purpose of making any such request; he did not even raise the issue at the recess which took place not long after Goodrich's testimony. (Tr. 1116-37). Likewise, Russillo never moved for a mistrial and therefore he "may not now on appeal complain of the trial court's failure to declare one." *United States* v. *Calles*, 482 F.2d 1155, 1162 (5th Cir. 1973); *Ladakis* v. *United States*, 283 F.2d 141, 143 (10th Cir. 1960).

POINT IX

The Prosecutor's Statement That He Believed a Witness Could Make a Voice Indentification Did Not Create Error.

By way of introduction, the prosecutor informed the trial court that a witness might be able to identify the voice of Variano on one of the tapes which the Government wished to introduce into evidence.* Contrary to

---

* The relevant exchange is set forth below:

THE COURT: All right, pass those transcripts back.

MR. ABZUG: Your Honor, I also believe Douglas Wilhelmi can make another voice identification of another call that was recorded, that is the call on November 14, 1974, at 1700 hours, 46-B marked for identification. He has not listened to that tape prior to this proceeding, your Honor, and the procedure which the government respectfully suggests is that there are earphones that Mr. Wilhelmi could listen to the conversation, or portion of the conversation, make the identification if he is able to make the identification, then we could play it over the speakers to the jury. (Government's Exhibit 46-B marked for identification.)

MR. BRODERICK: I object to that. How is the government so sure he is going to make that identification?

MR. MITCHELL: Your Honor, if the witness is going to identify a voice from a tape I think the government hasn't had the identification established as yet, the defense would be entitled to a Wade hearing on the voice. Why should he be limited to one voice? Let him pick the voice out from several.

MR. BRODERICK: Your Honor, that's my application in full when I said I was totally surprised.

MR. ABZUG: Your Honor, he has already testified that he is familiar with the voice of Peter Variano. The foundation has been laid. He has already identified one telephone call. If the man is able to identify this voice that we are about to play as Peter Variano and that of Joseph Millow, he will do that. If not, the government will withdraw its offer of proof. It's as simple as that. (Tr. 1154-55).

Variano's characterization of this statement, the prosecutor was hardly "testifying" that Variano was a participant in the conversation, nor was he making a personal comment on the witness' credibility. See *United States* v. *Murphy*, 374 F.2d 651, 655 (2d Cir.), *cert. denied*, 389 U.S. 836 (1967). Although an objection was made, it is apparent from the record that it was not on the ground now asserted. Trial counsel did not find that the comment warranted a motion to strike, a curative instruction, or a motion for a mistrial. If there were any possibility that this comment could have been construed by the jury as a statement that Variano participated in the conversation, any prejudice was prevented by both the court's and counsels' repeated admonitions that lawyers' statements were not evidence. (Tr. 305, 321, 335, 1311, 1375, 1441).

POINT X

The Prosecutor's Summation Was Proper.

Without citation to a single page in the record or to any specific statement, Variano argues that the prosecutor's summation improperly referred to hearsay. (Variano Br. 39). Although he claims that "objections were taken," the only objections raised by trial counsel related to differences in recollection as to the record and as to defense counsel's summation (Tr. 1316, 1437). The failure to object would waive consideration on appeal absent plain error, *United States* v. *Canniff*, 521 F.2d 565, 572 (2d Cir. 1975), *cert. denied*, 423 U.S. 1059 (1976); *United States* v. *Martin*, 525 F.2d 703, 707 (2d Cir. 1975); *United States* v. *Briggs*, 457 F.2d 908, 912 (2d Cir.), *cert. denied*, 409 U.S. 986 (1972). However, given defense counsel's inability to find even one example of the purportedly improper comments, this Court should

not even consider the issue as having been raised on appeal.*

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

MICHAEL D. ABZUG,
Special Attorney,
Department of Justice.
AUDREY STRAUSS,
Assistant United States Attorney,
Of Counsel.

---

* We submit that counsel's failure to specify a single instance of improper comment is due to the absence of any objectionable matter in the Government's summation.

★ U. S. Government Printing Office 1976— 714—019—NYJS[illegible] —05

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

M. Abzug being duly sworn, deposes and says that he is employed in the office of New York Joint Strike Force for the Southern District of New York.

That on the 18th day of November, 1976 he served 1 copy(s) of the within Brief by placing the same in a properly postpaid franked envelope addressed:

B. Alan Seidler, Esq.
401 Broadway
Suite 604
New York, N. Y. 10013

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

M. Abzug

Sworn to before me this
18th day of November, 1976

Elizabeth A. McKeever

ELIZABETH A. McKEEVER
Notary Public, State of New York
No. 43-4629102
Qualified in Richmond County
Commission Expires March 30, 1978

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

M. Abzug being duly sworn, deposes and says that he is employed in the office of the Strike Force for the Southern District of New York.

That on the 18th day of November he served 2 copies of the within Briefs by placing the same in a properly postpaid franked envelope addressed:

Irving Katcher
38 Park Row
New York, N.Y.
(Atty. for Henry Bucci)

Irving Anolik
225 Broadway
New York, N.Y. 10007
(Atty. for Peter Variano)

Armende Lesser
475 Fifth Ave.
New York, N.Y. 10017
(Atty. for John Monaco)

Paul A. Victor
67 Wall St.
New York, N.Y. 10005
(Atty. for Michael Evangelista

Edward Panzer & Julia P. Heit, 299 Broadway, New York, N.Y. 10007
(Attys. for Michael DeMichaels)

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

M. Abzug

Sworn to before me this

18th day of November, 1976

Elizabeth A. McKeever

ELIZABETH A. McKEEVER
Notary Public, State of New York
No. 43-4629102
Qualified in Richmond County
Commission Expires March 30, 1978